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8 **UNITED STATES DISTRICT COURT**
9 **CENTRAL DISTRICT OF CALIFORNIA**
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11 AARON SPERSKE,

12 Plaintiff,

13 v.

14 ARIEL ROSENBERG a/k/a ARIEL
15 PINK; KWANG NAM KOH p/k/a TIM
16 KOH; KENNETH JOHN GILMORE; and
17 ARIEL PINK'S HAUNTED GRAFFITI,

18 Defendants.
19

Case No. 2:12-cv-07034-ODW(JCx)

**ORDER DENYING MOTION FOR
SUMMARY JUDGMENT [62];
ORDER VACATING DEFAULT
JUDGMENT AGAINST ARIEL
PINK'S HAUNTED GRAFFITI [34]**

20 In May 2012, band members Ariel Rosenberg, Kwang Nam Koh, and Kenneth
21 John Gilmore ousted drummer Aaron Sperske from the band Ariel Pink's Haunted
22 Graffiti. Shortly thereafter, the band released the album *Mature Themes* and had
23 moderate business success. Having been slighted, Sperske brought this action against
24 the band and the individual band members. Sperske's Complaint alleges four claims
25 for relief: (1) declaratory relief and an accounting under the Copyright Act for 25%
26 ownership of the copyrights to the compositions on the album *Mature Themes*;
27 (2) declaratory relief under the California Uniform Partnership Act; (3) an accounting
28 of partnership assets and proceeds; and (4) breach of fiduciary duty.

The Court entered default judgment against Ariel Pink's Haunted Graffiti on
October 23, 2012. (ECF No. 34.) Sperske now moves the Court for summary

1 judgment against the individual Defendants. (ECF No. 62.) After considering the
 2 papers filed by Sperske and the oral arguments presented at the hearing, the Court
 3 **DENIES** Sperske's Motion for Summary Judgment. The Court also **VACATES** the
 4 earlier-issued default judgment against Ariel Pink's Haunted Graffiti.

5 **II. BACKGROUND**

6 Ariel Rosenberg started the band Ariel Pink's Haunted Graffiti in 1996.
 7 (Rosenberg Decl. ¶ 2 (ECF No. 36-1).) In about 2008, the members of the band
 8 consisted of Ariel Rosenberg, Kwang Nam Koh, Kenneth John Gilmore, Aaron
 9 Sperske, and a fifth individual. (SUF ¶ 1.) In late 2009, the band entered into a
 10 recording contract with 4AD Records. (SUF ¶ 5.) Each band member signed the
 11 4AD contract. (SUF ¶ 6.) The band released two albums under the recording
 12 contract: *Before Today* in 2010 and *Mature Themes* in 2012. (SUF ¶ 7.)

13 On May 15, 2012, Rosenberg, Koh, and Gilmore ousted Sperske from the band.
 14 (Compl. ¶ 13.) After Sperske's departure, the band continued its business, earning a
 15 total of \$219,498, from touring revenue and merchandise sales. (SUF ¶ 23.)

16 Earlier in this case, the Court granted Sperske's Motion for Default Judgment
 17 against Ariel Pink's Haunted Graffiti. (ECF No. 34.) After conducting discovery,
 18 Sperske filed this Motion for Summary Judgment against Rosenberg, Koh, and
 19 Gilmore in their individual capacities.

20 **III. LEGAL STANDARD**

21 Summary judgment should be granted if there are no genuine issues of material
 22 fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ.
 23 P. 56(c). The moving party bears the initial burden of establishing the absence of a
 24 genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323–24 (1986).
 25 Once the moving party has met its burden, the nonmoving party must go beyond the
 26 pleadings and identify specific facts through admissible evidence that show a genuine
 27 issue for trial. *Id.*; Fed. R. Civ. P. 56(c). Conclusory or speculative testimony in
 28 affidavits and moving papers is insufficient to raise genuine issues of fact and defeat

1 summary judgment. *Thornhill's Publ'g Co. v. GTE Corp.*, 594 F.2d 730, 738 (9th
2 Cir. 1979).

3 A genuine issue of material fact must be more than a scintilla of evidence, or
4 evidence that is merely colorable or not significantly probative. *Addisu v. Fred*
5 *Meyer*, 198 F.3d 1130, 1134 (9th Cir. 2000). A disputed fact is “material” where the
6 resolution of that fact might affect the outcome of the suit under the governing law.
7 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1968). An issue is “genuine” if
8 the evidence is sufficient for a reasonable jury to return a verdict for the nonmoving
9 party. *Id.* Where the moving and nonmoving parties’ versions of events differ, courts
10 are required to view the facts and draw reasonable inferences in the light most
11 favorable to the nonmoving party. *Scott v. Harris*, 550 U.S. 372, 378 (2007).

12 IV. DISCUSSION

13 This case is complicated by Defendants’ halfhearted defense. First, the Court
14 entered default judgment against the band because the band, as a partnership, never
15 responded to the allegations in the Complaint. (ECF No. 34.) Next, the individual
16 Defendants hired lawyers to file their Answers to the Complaint, but soon thereafter,
17 the lawyers withdrew citing irreconcilable differences and failure to pay. (ECF
18 No. 51.) Now, in the face of Sperske’s summary-judgment Motion, the individual
19 Defendants failed to file an opposition.

20 Sperske’s Motion for Summary Judgment essentially seeks resolution of two
21 issues: (1) whether Sperske and the Individual Defendants formed a partnership; and
22 (2) whether Sperske is a co-author and co-owner of the 12 compositions on the album
23 *Mature Themes*. The direction of the remaining causes of action—how the band’s
24 profits should be distributed—necessarily flow from the determination of these two
25 issues. The Court first turns to the partnership issue.

26 A. Partnership

27 Under California Law, “the association of two or more persons to carry on as
28 co-owners a business for profit forms a partnership, whether or not the persons intend

1 to form a partnership.” Cal. Corp. Code § 16202(a). If not in writing, a partnership
 2 can be inferred if parties participate in (1) profits and losses, (2) contributing money,
 3 property, or services, and (3) management of the business. *In re Lona*, 393 B.R. 1, 14
 4 (Bankr. N.D. Cal. 2008); *Dickenson v. Samples*, 104 Cal. App. 2d 311, 315 (1951)
 5 (“To participate to some extent in the management of a business is a primary element
 6 in partnership organization, and it is virtually essential to a determination that such a
 7 relationship existed.”).

8 Sperske alleges that he and the individual Defendants entered into an oral
 9 partnership agreement, and also asserts that his status as a partner is evidenced by his
 10 contribution of services and receipt of profits while touring with the band. (SUF
 11 ¶ 13.) Though the individual Defendants failed to file an opposition, it is obvious that
 12 they oppose Sperske’s assertions based upon their earlier-filed motions for
 13 reconsideration. (ECF Nos. 36, 47.)

14 First, profit sharing is not sufficient to demonstrate partnership if such sharing
 15 could just as easily constitute wages for employment with the band. Cal. Corp. Code
 16 § 16202(c)(3)(B). Sperske has not shown that his profit sharing was anything more
 17 than wages; for example, he has not shown that he “filed partnership tax returns or
 18 made partner draw payments.” *Fredianelli v. Jenkins*, No. C-11-3232 EMC, 2013
 19 WL 1087653, at *15 (N.D. Cal. Mar. 14, 2013). This suggests that Sperske is trying
 20 to retroactively claim the benefits of partnership without paying for the privilege up
 21 front.

22 Second, even if some of the hallmarks of a partnership are present (e.g., sharing
 23 of profits and contribution of services), Sperske has not proven the primary element of
 24 a partnership: participation in the band’s management. Rather, evidence suggests that
 25 Rosenberg was the main force behind the band and controlled the band’s creative and
 26 business decisions, including personnel decisions. (Rosenberg Decl. ¶¶ 2–7 (ECF
 27 No. 36-1).) Simply put, the fact Sperske was “a band ‘member’ does not necessarily
 28 denote ownership.” *Fredianelli*, 2013 WL 1087653 at *16 (citing *Bartels v.*

1 *Birmingham*, 332 U.S. 126, 127–28 (1947) (members of “name bands” are employees
2 and the leader is the employer)).

3 Third, Sperske’s failure to name other ex-band members as partners is telling.
4 Under Sperske’s logic, there should be other partners of the band in addition to
5 Sperske and the three individual Defendants: Cole M. Grief-Neill, Jimmy Hey, Joe
6 Kennedy, and Ryeland Allison. (Rosenberg Decl. ¶¶ 4–8 (ECF No. 36-1).) For
7 instance, Kennedy and Sperske have a similar history and relationship with the band:
8 they each replaced former band members and performed similar services. Yet
9 Sperske does not explain how it is that he became a partner upon replacing Hey (the
10 previous drummer), while Kennedy’s replacing of Greif-Neill (the previous lead
11 guitar) imputed to him no such partnership benefit. (*Id.*) Sperske is also silent on the
12 partnership status of other past and present band members.

13 Thus, because there are genuine issues of material fact concerning the existence
14 of a partnership, the Court must **DENY** summary judgment on Sperske’s partnership
15 claims, including the second claim for declaratory relief under the California Uniform
16 Partnership Act, the third claim for an accounting of partnership assets and proceeds,
17 and the fourth claim for breach of fiduciary duty.

18 **B. Copyright ownership and accounting**

19 Sperske’s claim under the Copyright Act has two subparts: whether Sperske is a
20 co-author and co-owner of the copyright to the compositions on *Mature Themes*; and
21 if that is so, what Defendants owe him.

22 *i. Copyright ownership*

23 Authors of a joint work are co-owners of copyright in the work. 17 U.S.C.
24 § 201(a). But if the work was prepared for another, it may be considered a work for
25 hire and the person for whom the work was prepared is considered the sole author and
26 owner of the work. 17 U.S.C. § 201(b). A certificate of registration is prima facie
27 evidence of a copyright’s validity if it is registered before or within five years after
28 first publication of the work. 17 U.S.C. § 410(c). However, the presumptive validity

1 a certificate may be rebutted and defeated on summary judgment. *S.O.S., Inc. v.*
 2 *Payday, Inc.*, 886 F.2d 1081, 1086 (9th Cir. 1989).

3 Sperske claims he helped compose and record 12 compositions on *Mature*
 4 *Themes*, and therefore co-owns the copyrights to those compositions. (SUF ¶ 8.) He
 5 also submits as evidence a certificate of registration issued by the Copyright Office.
 6 (Sperske Decl., Ex. A.) The certificate lists Sperske, Rosenberg, Gilmore, and Koh as
 7 co-authors and copyright claimants of all 12 compositions on *Mature Themes*. (*Id.*)

8 But the Court finds it suspicious that this certificate was issued several months
 9 *after* Sperske initiated this suit. Logic dictates that this certificate was filed without
 10 consent by Rosenberg, Gilmore, and Koh, because this certificate was filed by Evan S.
 11 Cohen, Sperske's attorney in this case. (*Id.*) Indeed, Rosenberg has asserted that
 12 Sperske only helped compose three songs and record four songs on *Mature Themes*.
 13 (Rosenberg Decl. ¶¶ 3–4 (ECF No. 36-1).) Rosenberg also explained that publishing
 14 rights (i.e., copyright ownership rights) were not to be distributed equally: since
 15 Rosenberg did the majority of the song writing, he received the lionshare of the
 16 publishing rights over the other band members. (*Id.* ¶¶ 5, 7.)

17 Accordingly, because there are genuine issues of material fact concerning
 18 authorship and ownership of the 12 songs on *Mature Themes*, the Court must **DENY**
 19 summary judgment on Sperske's copyright claim.

20 *ii. Copyright accounting*

21 Even if Sperske is assumed to own 25% of the copyright (and assuming there is
 22 no partnership), the Court notes that there are genuine issues of material fact
 23 concerning how the band proceeds are to be distributed to the copyright owners.
 24 Specifically, Sperske fails to distinguish proceeds obtained by way of the copyright
 25 and proceeds obtained otherwise. While he submits that the band has earned
 26 \$219,498 since May 15, 2012, this figure shows only the total proceeds earned from
 27 touring and merchandise sales without discerning what amount was derived from the
 28 copyright. (SUF ¶ 7.) It would be incorrect to assert that the entire \$219,498 was

1 derived from the copyright and therefore, should be split based on copyright
2 ownership percentages—25% to each of Sperske and the three individual Defendants.
3 Thus, this remains a factual issue for determination at trial.

4 **C. Effect on prior default judgment**

5 Justice demands vacating the default judgment against the partnership. In the
6 Ninth Circuit, courts may act sua sponte to adjust default judgments. *Kingvision Pay-*
7 *Per-View Ltd. v. Lake Alice Bar*, 168 F.3d 347, 351 (9th Cir. 1999). Courts may set
8 aside a default judgment under Federal Rule of Civil Procedure 60(b). Fed. R. Civ.
9 P. 55(c). Relief under Rule 60(b) may be based upon mistake, inadvertence, surprise,
10 excusable neglect, newly discovered evidence, fraud, void judgment, satisfied
11 judgment, or for “any other reason justifying relief.” Fed. R. Civ. P. 60(b). Absent
12 highly unusual circumstances, the district court should decline to reconsider an order
13 unless it committed clear error, is presented with newly discovered evidence, or is
14 notified of an intervening change in the controlling law. *Marlyn Nutraceuticals, Inc.*
15 *v. Mucos Pharma GmbH & Co.*, 571 F.3d 873, 880 (9th Cir. 2009).

16 Though the Court previously denied motions for reconsideration filed by the
17 individual Defendants, the Court now finds that the default judgment is inconsistent
18 with evidence submitted in this case and believes that it committed a clear error. This
19 inconsistency is compounded by the fact that Sperske deems the default judgment
20 against the partnership to be practically insufficient. There are real questions
21 concerning whether Ariel Pink’s Haunted Grafitti was ever a partnership and who
22 those partners may have been.

23 The Court alerted Sperske to this issue at the hearing on June 24, 2013.
24 Sperske’s Response to the Court’s concerns itself raised questions whether Ariel
25 Pink’s Haunted Grafitti was ever a partnership. (ECF No. 76 (“For example, ASCAP,
26 the performing rights society which collects and distributes performance royalties to
27 songwriters and publishers, pays individual songwriters according to the percentages
28 submitted.”).) In light of that Response and the findings discussed here, the Court


1 hereby **VACATES** the default judgment entered against Ariel Pink's Haunted
2 Graffiti. (ECF No. 34.)

3
4 **V. CONCLUSION**

5 For the reasons discussed above, Sperske's Motion for Summary Judgment is
6 **DENIED**. (ECF No. 62.) The Court also **VACATES** the default judgment
7 previously entered against Ariel Pink's Haunted Graffiti on October 23, 2012. (ECF
8 No. 34.)

9 **IT IS SO ORDERED.**

10 July 23, 2013

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13 **OTIS D. WRIGHT, II**
14 **UNITED STATES DISTRICT JUDGE**
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